

RUEL SALVA MERCADO,)	
)	
Petitioner,)	3:02-cv-0357-ECR-RAM
)	
vs.)	
)	
JACKIE CRAWFORD, <i>et al.</i> ,)	ORDER
)	
)	
Respondents.)	
)	

I. Background

Petitioner was charged with murder which resulted from a botched attempt to rob the Renata Bar in Henderson, Nevada. Petitioner and three other individuals, all members of the Pinoy or Flipside gangs, planned and attempted to rob the casino cage during the early morning hours of November 25, 1994. During the attempted robbery, one robber shot and injured the bartender and another shot and killed another employee. All were ultimately arrested and charged with first degree murder with the use of a deadly weapon and numerous other charges related to the robbery which included potential deadly weapon and gang enhancements. The prosecution filed its notice of intent to seek the death penalty. Ultimately all but petitioner entered guilty pleas to murder. At least one agreement required that defendant's testimony against petitioner at trial. Petitioner stood trial facing

1 the death penalty. One of the co-defendants, Felix Austria, testified against him. Another witness,
2 Carl Flores, was a paid FBI informant and member of the Flipside gang. Petitioner was represented
3 by two experienced defense attorneys appointed for him by the court.

4 **II. Procedural History**

5 Petitioner and three co-defendants were charged with twenty-two counts: count I,
6 murder with the use of a deadly weapon; count II, attempted murder with the use of a deadly
7 weapon; count III, burglary while in possession of a deadly weapon with the intent to promote,
8 further, or assist a criminal gang; counts IV, V, and VI, attempted robbery with the use of a deadly
9 weapon with the intent to promote, further, or assist a criminal gang; counts VII, first degree
10 kidnapping with the use of a deadly weapon with intent to promote, further, or assist a criminal gang;
11 counts VII-XXII, coercion with the use of a deadly weapon with the intent to promote, further, or
12 assist a criminal gang; and count XXI, possession of a stolen vehicle with the intent to promote,
13 further, or assist a criminal gang. Exhibit 22.¹ The state filed notice of its intent to seek the death
14 penalty in petitioner's case. Exhibit 24.

15 A preliminary hearing was held between January 4, 1995 and January 19, 1995.
16 Exhibits 10, 14-17 and 19. The state amended the charges against the petitioner, and petitioner was
17 charged, by way of information, with one count of murder with the use of a deadly weapon, one
18 count of attempted murder with a deadly weapon, one count of burglary while in possession of a
19 deadly weapon with the intent to promote, further, or assist a criminal gang, three counts of
20 attempted robbery with the use of a deadly weapon with the intent to promote, further, or assist a
21 criminal gang, two counts of first degree kidnapping with a deadly weapon with the intent to
22 promote, further, or assist a criminal gang, and fourteen counts of coercion with the use of a deadly
23 weapon with the intent to promote, further, or assist a criminal gang. Exhibit 80. After a jury trial,
24 petitioner was convicted as charged of counts I-VII, IX, and XI-XX. Exhibit 91.

25
26 ¹ The exhibits cited in this order in the form "Exhibit ____," are those filed by petitioner in support of his original petition for writ of habeas corpus and the amended petition, and are located in the record at docket #13-19 and #38.

1 The trial court sentenced petitioner as follows: count I, to life imprisonment without
2 the possibility of parole, with an equal and consecutive sentence for the use of a deadly weapon;
3 count II, to twenty years in prison with a consecutive twenty year sentence for the deadly weapon;
4 count III, to ten years in prison with an equal and consecutive sentence for the use of a deadly
5 weapon; counts IV, V and VI, to seven and one half years with an equal and consecutive sentence;
6 counts VII and IX, to life in prison with the possibility of parole with an equal and consecutive
7 sentence for the use of a deadly weapon; counts XI-XX, to six years in prison plus an equal and
8 consecutive sentence for the use of a deadly weapon. Exhibit 110. Count IV is to run consecutively
9 to count II, count V is to run consecutively to count IV, and count VI is to run consecutively to count
10 V. *Id.* A judgment of conviction was entered on December 19, 1995. *Id.*

11 Petitioner appealed, arguing (1) the trial court erred in denying a motion for mistrial,
12 as the state failed to disclose impeachment evidence on a testifying co-defendant until after trial, (2)
13 he was denied a fair trial due to the state's use of printouts that contained criminal records on
14 prospective jurors during voir dire, (3) the trial court erred in allowing a letter allegedly written by
15 the petitioner into evidence, (4) the penalty hearing was fundamentally unfair because the trial court
16 allowed into evidence a videotape of the victim with his family, and (5) the petitioner is entitled to a
17 new penalty hearing since there was insufficient evidence that the murder was committed to avoid a
18 lawful arrest. Exhibit 115. The Nevada Supreme Court dismissed the appeal. Exhibit 125.
19 Remittitur issued on May 6, 1998. Exhibit 126.

20 Petitioner filed a state habeas corpus petition on March 25, 1999. Exhibit 127. The
21 petition alleged thirty-four grounds for relief. *Id.* The state district court denied the petition. Exhibit
22 130. The court found grounds one, three, six through twenty-two, twenty-five through thirty-one and
23 thirty-three was waived pursuant to NRS 34.810 as they should have been raised on direct appeal.
24 *Id.* at 6. The court denied claims twenty-three and twenty-four, stating they were raised on direct
25 appeal and the law of the case doctrine prevented the court from revisiting those issues. *Id.* at 8.
26 Finally, the court found claims two, four, five, ten and thirty-two were without merit. *Id.* at 10-11.

1 The Nevada Supreme Court affirmed the lower court's denial in part and reversed in
2 part. Exhibits 132 and 135. The court first found petitioner's ineffective assistance of counsel
3 claims to be without merit. Exhibit 135 at 3-7. Next the court addressed petitioner's ineffective
4 assistance of appellate counsel claims. *Id.* at 7. The court determined that to the extent the petitioner
5 raised any of his issues separately from an ineffective assistance of appellate counsel claim, he had
6 waived those issues. *Id.* at n. 9. The Nevada Supreme Court then found seventeen of petitioner's
7 ineffective assistance of appellate counsel claims to be without merit. *Id.* at 8-22. The court noted
8 that petitioner's claim that appellate counsel failed to argue that the trial court abused its discretion
9 in denying his motion for a new trial was barred by the law of the case doctrine, as the underlying
10 issue, whether he was denied a full opportunity to cross-examine a witness due to prosecutorial
11 misconduct, was litigated on direct appeal. *Id.* at 18.

12 With regard to the petitioner's final claim, the Nevada Supreme Court stated that the
13 lower court had abused its discretion in failing to appoint postconviction counsel. *Id.* at 25. The
14 court reversed the district court's order with regard to that claim, and stated that the lower court
15 should appoint counsel and allow counsel to supplement the petition as it related to petitioner's
16 claim that appellate counsel failed to argue that his convictions violated due process and double
17 jeopardy. *Id.* Remittitur issued July 2, 2002. Exhibit 136.

18 Petitioner filed a federal habeas petition in this court. This court appointed counsel to
19 represent petitioner. Counsel filed an amended petition for writ of habeas corpus on April 15, 2003.
20 Respondents moved to dismiss the petition, arguing that the petition was premature as the state
21 habeas corpus proceedings were not finished, and that some of the claims were unexhausted. This
22 court agreed, and granted the motion to dismiss. The action was dismissed without prejudice and
23 administratively closed while the petitioner returned to state court.

24 The state district court appointed counsel to represent the petitioner, and counsel filed
25 a supplemental postconviction petition. Exhibit 148. An evidentiary hearing was held, and the state
26 conceded that the two kidnapping counts (counts VII and IX) were incidental to the robbery. Exhibit

1 146, T 5). After hearing testimony, the trial judge also dismissed two of the robbery counts. *Id.*, T
 2 85. The court denied the rest of the claims contained in the supplemental petition. Exhibit 151.
 3 Petitioner appeal, and the Nevada Supreme Court affirmed the denial of the lower court's order.
 4 Exhibit 155.

5 Petitioner moved to reopen the case in this court. This court granted the motion
 6 (docket #36) and petitioner filed a second amended petition. On respondents' motion to dismiss the
 7 court found claims one, three, four, five, six, seven, eight, nine, ten, thirteen, fourteen, fifteen,
 8 sixteen, and seventeen to be procedurally defaulted. Respondents have now filed their answer to the
 9 surviving claims for relief, grounds two, eighteen, nineteen, and twenty, and petitioner had replied.

10 **II. Discussion**

11 A. Federal Habeas Standard

12 28 U.S.C. §2254(d), a provision of the Antiterrorism and Effective Death Penalty Act
 13 (AEDPA), provides the standards of review that this Court applies to the petition in this case:

14 An application for a writ of habeas corpus on behalf of a
 15 person in custody pursuant to the judgment of a State court shall not be
 16 granted with respect to any claim that was adjudicated on the merits in
 State court proceedings unless the adjudication of the claim --

17 (1) resulted in a decision that was contrary to, or involved an
 18 unreasonable application of, clearly established Federal law, as
 determined by the Supreme Court of the United States; or

19 (2) resulted in a decision that was based on an unreasonable
 20 determination of the facts in light of the evidence presented in the
 State court proceeding.

21 28 U.S.C. §2254(d).

22 A state court decision is contrary to clearly established Supreme Court precedent,
 23 within the meaning of 28 U.S.C. §2254, "if the state court applies a rule that contradicts the
 24 governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts
 25 that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives
 26 at a result different from [the Supreme Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 123

1 S.Ct. 1166, 1173, 155 L.Ed.2d 144 (2003) (*quoting Williams v. Taylor*, 529 U.S. 362, 405-06, 120
 2 S.Ct. 1495, 146 L.Ed.2d 389 (2000), and *citing Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152
 3 L.Ed.2d 914 (2002).

4 A state court decision is an unreasonable application of clearly established Supreme
 5 Court precedent, within the meaning of 28 U.S.C. §2254(d), “if the state court identifies the correct
 6 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
 7 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 74, 123 S.Ct. at 1174
 8 (*quoting Williams*, 529 U.S. at 413, 120 S.Ct. 1495). The “unreasonable application” clause requires
 9 the state court decision to be more than incorrect or erroneous; the state court’s application of clearly
 10 established law must be objectively unreasonable. *Id.* (*quoting Williams*, 529 U.S. at 409, 120 S.Ct.
 11 1495).

12 Ground Two

13 In Ground Two, petitioner claims

14 The State used criminal history printouts for prospective jurors during voir dire
 15 without providing the information to defense counsel in violation of Mr.
 16 Mercado’s Fifth, Sixth and Fourteenth Amendment rights to due process and a
 fair trial under the United States Constitution.

17 According to petitioner, during jury selection the prosecution, without disclosure to
 18 the defense, questioned prospective jurors based in part on information contained in a SCOPE
 19 printout.² Once the defense became aware of the SCOPE reports and objected, the court granted the
 20 defense access to the reports and then allowed the defense to further question any seated juror which
 21 the SCOPE reports referenced. Petitioner contends that this review and re-questioning was granted
 22 in a limited time frame and with significant pressure from the court to move the process along.
 23 Petitioner asserts that the court refused the defense request to strike the panel and to start voir dire
 24 again because it would consume too much time.

25
 26 ² According to petitioner, SCOPE printouts are criminal history reports generated by the Las Vegas Metropolitan Police Department (docket #57, fn 2).

1 Respondents note the treatment of this claim by the Nevada Supreme Court which
2 stated in its order denying appeal

3 Mercado claims that he was denied his constitutional right to a fair trial
4 because the State failed to disclose sixteen Scope reports prior to its voir dire
5 examination of potential jurors. Mercado maintains that the State has an unfair
6 advantage because it possessed the criminal records of prospective jurors to the
7 exclusion of the defense during a critical state of the proceedings.

8 We conclude that any error created by the State's failure to disclose the
9 Scope reports was cured when the district court allowed Mercado access to the
10 Scope reports later in the jury selection process and because Mercado was given
11 the opportunity to use the Scope reports to reexamine those jurors who had been
12 seated. [fn 6: Access was allowed prior to the exercise of peremptory challenges.]

13 Exhibit 125, p. 8. Respondents argue that petitioner has not identified any United States Supreme
14 Court decision disfavoring the use of SCOPE or criminal record histories of potential jurors and
15 argue that the trial court did, in fact, cure any error created by the prosecutions non-disclosure by
16 allowing the defense an opportunity to use the reports and examine the seated jurors based on the
17 information in the reports.

18 A review of the trial transcript suggests to this court that the Nevada Supreme Court's
19 decision on appeal was a reasonable determination of the facts based on the evidence. The transcript
20 demonstrates that apart from the prosecutor taking offense at petitioner's objection to the
21 undisclosed SCOPE reports, the proceedings were not pressured and did not otherwise undermine
22 petitioner's opportunity to question the jurors based on the information contained in the SCOPE
23 reports. *See* Exhibit 76, pp 194-212. Defense counsel preserved the record for appeal and was given
24 the opportunity to question all of the jurors already seated. He propounded questions for the two
25 jurors which had relevant SCOPE information and declined to question any of the other jurors with
26 SCOPE reports, as those reports showed nothing relevant to voir dire. *Id.*

27 Petitioner was given a full and fair opportunity to question and uncover any biases of
28 the jury panel. He was able to protect his client's right to a fair and impartial jury. *See McDonough*
29 *Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984). The state court's denial of this claim was
30 not an unreasonable or contrary application of clearly established federal law and petitioner is not

entitled to relief on this claim.

Ground Eighteen³

During the penalty phase of Mr. Mercado's trial, the court allowed the prosecution to play a videotape showing Mr. Serna with his family at a holiday family dinner. This improper victim impact testimony violated Mr. Mercado's constitutional rights guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner contends that the video tape of the victim with his family at a holiday gathering accompanied by sentimental background music was impermissible victim impact evidence which was overwhelmingly prejudicial and inflammatory in nature. Petitioner argues the evidence violated his due process rights because it rendered the sentence fundamentally unfair, citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) and *Kelly v. California*, 129 S.Ct. 564 (2008) (Stevens, J., advisory opinion).

Respondents argue that the admission was proper and that petitioner has not shown any prejudice suffered from the evidence because he was not sentenced to death.

In *Payne*, the United States Supreme Court held that the Eighth Amendment provided no *per se* bar to victim impact evidence or prosecutorial argument on that subject because "it was relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.*, 827. At the sentencing hearing, petitioner presented testimony from members of his family and from a mental health expert all of whom testified about his childhood, his drug use and its impact on his actions and decision-making. The prosecution put on witnesses who testified about the victim and his family, about the petitioner's mental state and his drug use. Both sides were given an opportunity to present evidence related to the petitioner's culpability and the victim's nature – "his uniqueness as an individual human being." *Id.* at 823.

The Nevada Supreme Court relied on *Payne* in reaching its decision on this claim on direct appeal. That court concluded

³ Grounds Eleven and Twelve survived the motion to dismiss, but have been abandoned by petitioner as he was granted relief on the claims by the state trial court in post-conviction proceedings. *See*, Docket #57, p. 12 and Exhibit 146.

1 [T]he district court did not abuse its discretion in admitting the videotape at the
 2 penalty hearing. Just as Mercado was allowed to offer any mitigating evidence
 the State,

3 “has a legitimate interest in counteracting the mitigating
 4 evidence. . . by reminding the sentencer that just as the
 5 murdered should be considered as an individual, so too the
 victim is an individual whose death represents a unique loss
 to society and in particular to his family,” *Booth v.*
Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting.)”

6 *Homick v. State*, 108 Nev. 127, 136, 825 P.2d 600, 606 (1992) (quoting *Payne v.*
 7 *Tennessee*, 501 U.S. 808, 825 (1991)). We conclude that Mercado’s penalty
 8 hearing was not fundamentally unfair.

9 Accordingly, we reject Mercado’s request for a new penalty hearing on the
 basis of improper victim impact evidence.

10 Exhibit 125, p. 7.

11 Because the state court’s decision is not contrary to or an unreasonable application of
 12 the holding of the United States Supreme Court in *Payne*, this court cannot offer petitioner relief on
 13 this claim.

14 Ground Nineteen

15 Trial counsel made numerous errors during trial, including failure to object to
 16 important pieces of evidence, failure to file pre-trial motions, and failure to
 17 request the dismissal of charges unsupported by evidence. As a result, Mr.
 Mercado was denied the effective assistance of counsel in violation of his Sixth
 and Fourteenth Amendment rights under the United States Constitution.

18 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court established the standards
 19 by which claims of ineffective counsel are to be measured. In *Strickland*, the Court propounded a
 20 two-prong test; a petitioner claiming ineffective assistance of counsel must demonstrate (1) that the
 21 defense attorney’s representation “fell below an objective standard of reasonableness,” and (2) that
 22 the attorney’s deficient performance prejudiced the defendant such that “there is a reasonable
 23 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been
 24 different.” *Strickland*, 466 U.S. at 688, 694.

25 Petitioner makes numerous claims of error on the part of his counsel. These claims
 26 must be examined applying a strong presumption that counsel rendered adequate assistance and

1 made all significant decisions in the exercise of reasonable professional judgment.” *Strickland*, 466
2 U.S. at 690. Petitioner’s claims are made with the benefit of hindsight and a close examination of
3 the record and trial transcript. However, the prosecution’s success in convicting a defendant does
4 not necessarily arise because of defense counsel’s performance. The strength of the evidence cannot
5 always be overcome by the defense. Second guessing and armchair quarter-backing will almost
6 always find things that could have been done differently. There is, however, no guarantee that a
7 different approach would achieve a different result. Petitioner’s claims are examined below.

8 A. Failure to file pre-trial motion to exclude the note allegedly written by
9 petitioner.

10 Petitioner contends that counsel should have made a pre-trial motion to exclude a note
11 found in petitioner’s bedroom rather than just objecting to the note’s admission during trial.
12 Petitioner contends the note was more prejudicial than probative because it related to another
13 criminal activity, and that its admission violated petitioner’s due process right because it was
14 admitted as character evidence of prior bad act to show his actions in the instant matter conformed
15 with those prior actions.

16 On appeal from the denial of his post-conviction petition the Nevada Supreme Court
17 denied relief finding that petitioner had failed to demonstrate how a pre-trial motion would have
18 been more effective than the motion made by counsel at the hearing. Exhibit 155, p. 3. This court
19 agrees. The record reveals that counsel made objection to the note during trial, but in the absence of
20 the jury with an opportunity to argue his position. Counsel’s arguments were cogent and he
21 advocated strongly for his client. The court did not rule in his favor. Petitioner has failed to
22 demonstrate how a pre-trial motion would have produced a different outcome.

23
24 B. Defense counsel failed to challenge a juror who thought that defendants
25 should have to prove their innocence.

26 A criminal defendant is guaranteed a trial by an impartial jury. The standard for
determining when a prospective juror may be dismissed for cause is whether the juror’s views would

1 “prevent or substantially impair the performance of his duties as a juror in accordance with his
 2 instructions and his oath.” *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) quoting *Witherspoon v.*
 3 *Illinois*, 391 U.S. 510 (1986).

4 During jury selection, one of the veniremen indicated on a written questionnaire that
 5 she believed because the district attorney was bringing the case it was likely that the defendant was
 6 guilty and that it was his burden to prove his innocence. Exhibit 76, p. 168. Counsel questioned the
 7 potential juror extensively, explaining the presumption of innocence and the right of the defendant to
 8 put the State to its proof and not make any defense at all. *Id.*, pp. 168-174. During the questioning,
 9 the juror demonstrated that she was not actually biased against the defendant. The Nevada Supreme
 10 Court denied petitioner relief on this claim. Exhibit 135. The court determined that petitioner had
 11 failed to demonstrate that counsel was ineffective because there was no basis to challenge the juror
 12 for cause and counsel’s failure to use a peremptory challenge to dismiss the juror was not prejudicial.
 13 *Id.* The court observed

14 When questioned, juror #28 affirmatively indicated that she understood a
 15 defendant was presumed innocent and that the standard for finding the defendant
 16 guilty was beyond a reasonable doubt. She stated that she accepted that and
 17 understood that the State must prove its case based upon the evidence against the
 18 defendant. She indicated that she understood that the defendant did not have to
 prove anything. Juror #28 indicated that she would follow the law as instructed.
 She stated that she would base her decision upon the evidence that she heard.
 Thus, there was no indication of a state of mind in the juror evincing bias.
 Therefore, this claim lacks merit.

19 *Id.* These factual findings are not unreasonable in light of the evidence. Neither is the court’s legal
 20 analysis contrary to or an unreasonable application of *Strickland*. No relief is warranted on this
 21 claim from this court.

22 C. Extensive information existed regarding Carl Flores’s instability and bias as a
 23 witness. Trial counsel failed to challenge Flores’s testimony and failed to
sufficiently investigate these issues prior to trial.

24 Petitioner claims that counsel failed to properly investigate and obtain witnesses that
 25 could have testified to the bad blood between petitioner and the state’s “star” witness, Carl Flores
 26 and that counsel’s examination of Flores was insufficient to uncover the depth of the animosity

1 between the two. Petitioner argues that this bad blood would have made it unlikely that petitioner
2 would have recruited Flores for or confided in him about the robbery. Petitioner does not identify
3 the witnesses that counsel should have called except Flores's brother, who was in prison.

4 According to the Nevada Supreme Court's order on appeal, counsel did cross-
5 examine Flores regarding his relationship with petitioner, which questioning allowed the jury to
6 evaluate his bias and weigh his testimony accordingly. Exhibit 155 *see also* Exhibit 83, p. 10.
7 Notably, Felix Austria, another witness, testified that petitioner trusted Flores and that was one of the
8 reasons he was recruited to participate in the robbery. Exhibit 87, p. 51.

9 Petitioner has failed to show how counsel's performance fell below the standard of
10 performance applicable in this case or that some change in counsel's strategy in this instance would
11 have changed the outcome. No relief is warranted.

12 D. Mr. Mercado's trial counsel was ineffective for failing to challenge Carl
13 Flores' testimony as a paid informant pretrial and to appropriately argue that
the prosecution improperly presented FBI Agent Kelliher's testimony.

14 Petitioner alleges that counsel failed to highlight the fact that Flores was a paid FBI
15 and police informant and that his failure to do so was ineffective representation. He further alleges
16 that the testimony of FBI Agent Kelliher was improper because she refused to testify whether Flores
17 had been an informant in any other cases.

18 The first part of the claim is belied by the record. Counsel cross-examined Flores and
19 brought out that he had received some twenty-seven hundred dollars from police and that he might
20 be eligible for a twenty-five thousand dollar reward following his testimony against petitioner.
21 Exhibit 83, pp. 21-26. Counsel elicited Flores's testimony about payments of \$200, \$500, and \$2000
22 dollars from police. Counsel brought out Flores's previous testimony that anything he asked the
23 police to do for him, the police did. *Id.*

24 As for the testimony of Agent Kelliher, petitioner, citing only Ninth Circuit case law,
25 claiming that the Nevada Supreme Court's decision was contrary to federal law. This, however, is
26 not the standard to which the state court's decision are held. Only decisions that are contrary to or an

1 unreasonable application of clearly established federal law as determined by the United States
2 Supreme Court warrants relief from this federal court. 28 U.S.C. § 2254(d); *see also, Riley v. Payne*,
3 352 F.3d 1313, 1322 (9th Cir. 2003). Moreover, the testimony of Agent Kelliher was that she had
4 developed a relationship with Flores where she sought general information, that he had given her
5 information on other cases, that she had given him money after she received information in the
6 instant case, but that she was not at liberty to discuss any other cases. Exhibit 83, pp. 49-53. Thus,
7 counsel was able to present for the jury's use the fact that Flores was receiving money for his
8 assistance in this case and that he had given information in other cases. In other words, Flores was a
9 paid informant for the FBI and local police. Petitioner has not shown how information about the
10 specifics of other cases would have decreased Flores's credibility before the jury. He has failed to
11 demonstrate that counsel's performance in this instance was deficient or that the Nevada Supreme
12 Court's decision was wrong in light of the restrictions placed by AEDPA and § 2254.

13 E. Mr. Mercado's trial counsel were ineffective for eliciting on cross-
14 examination the only positive identification of Mr. Mercado as a participant in
the offense.

15 Petitioner contends that counsel was ineffective when he questioned witness Husted
16 and as a result elicited testimony that petitioner was one of the robbers. He suggests that counsel
17 should have foreseen this identification and was ineffective for failing to do so.

18 In this instance, the witness had testified that the robbers wore masks or bandanas
19 over their faces and that all she could see was his eyes and hair. Despite this testimony, the witness
20 then identified petitioner. Petitioner argues that this eye witness testimony was particularly
21 prejudicial and that counsel should never had pursued the questioning. At the post-conviction
22 evidentiary hearing, counsel testified that he asked the question of Husted because the discovery
23 materials indicated that none of the witnesses at the Renata on the night of the robbery attempt were
24 able to identify any of the participants. Exhibit 146, pp. 53-54. This was, therefore, a strategic
25 decision by counsel in hopes of leaving the jury with the indelible impression that no one could say
26 for sure who was the shooter. *Id.* The Nevada Supreme Court's analysis of the point is not invalid.

1 There were at least two other witnesses that put petitioner at the crime scene – his co-defendant,
2 Austria, and Carl Flores. Petitioner’s argument that these witnesses’s testimony was biased, each for
3 his own reason, is valid. But that bias was brought to the jury’s attention through cross-examination.

4
5 F. Trial counsel was ineffective for failing to challenge Felix Austria’s biased
6 testimony and fully elicit this critical credibility evidence.

7 Petitioner contends that counsel failed to bring out that Felix Austria received a plea
8 bargain benefit for his testimony against petitioner and that trial counsel was ineffective in failing to
9 question Austria as to whether he or another individual named Rodan were more likely to be the
10 shooter.

11 At trial Austria was called by the prosecution and testified about the planning and
12 botched execution of the Renata robbery. *See* Exhibit 86, pp. 104-161, and 87, pp. 11-87. He
13 testified that he, the petitioner, and two other gang members went to the Renata and attempted to
14 carry out a plan to rob the casino cage in hopes of netting between eighty and one hundred thousand
15 dollars. He testified that he had been charged with keeping the bartender and the patrons quiet and
16 still while petitioner was supposed to enter the cage and take the money from the drawers. He
17 further testified that the bartender made a move toward what Austria assumed was an alarm button
18 and Austria jumped upon the bar and shot at the bartender two times, striking him once in the
19 buttocks. Austria further testified that between his first and second shots he heard two other shots.
20 He was unable to identify where those shots came from. Austria further testified that once the
21 shooting was over he called for his companions to “get out” and he and J. George Chuatoco ran out a
22 side entrance and jumped into the waiting “get away” car driven by Otto Kaufman. According to
23 Austria, petitioner was not with Austria and Chuatoco, and Kaufman drove off without him.

24 Austria was asked by the prosecutor whether Rodan had been present on the
25 November 25th robbery attempt. Austria testified that Rodan had participated in the planning of the
26 robbery, but had “backed out” at the last minute and was not present. Exhibit 87, pp. 26 and 63-64.

1 Based on this testimony, petitioner's assertion that counsel should have questioned
2 Austria whether Rodan was the shooter instead of petitioner is unpersuasive. Austria had already
3 testified that Rodan was not present. If Rodan was not even present, he could not have been the
4 shooter. However, despite this testimony, defense counsel did ask Austria whether he had falsely
5 told police that petitioner had shot the victim, when it was Rodan who actually did it. Exhibit 87, pp.
6 67-68.

7 As for cross-examination regarding Austria's deal with the prosecution and his related
8 bias, counsel quite thoroughly questioned the witness on that point and on the benefit he received for
9 his testimony. Exhibit 87, pp. 63-64, 83-84. This claim is without merit and the Nevada Supreme
10 Court's decision was appropriate under 28 U.S.C. § 2254.

11 G. Trial counsel was ineffective for calling Felix Austria as a defense witness
12 during the penalty phase.

13 Petitioner contends that counsel failed to properly investigate for mitigating evidence
14 to present in the penalty phase of the trial. He complains that calling Felix Austria, petitioner's
15 cousin, to testify that he was responsible for petitioner's drug use, gang involvement, and
16 participation in the robbery and its planning was inappropriate and self-serving for Austria.

17 A court deciding an ineffectiveness claim must judge the reasonableness of counsel's
18 conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland v.*
19 *Washington*, 466 U.S. at 690. Strategic decisions of counsel, such as what witnesses to call and
20 evidence to present are virtually unassailable if made after reasonable investigation or a reasonable
21 decision that further investigation is unnecessary. *Id.*, at 691. These decisions are examined with a
22 "heavy deference to counsel's judgment." *Id.*

23 The Nevada Supreme Court believed Austria's testimony in the penalty phase did
24 provide mitigation for petitioner's actions. This court agrees. Austria's testimony was an attempt to
25 demonstrate that petitioner was young and unduly influenced by his older cousin, someone who had
26 pledged to look out for him, but who had been a negative influence. At the post-conviction

1 evidentiary hearing, counsel explained the basis for his to use Austria at the penalty phase. Counsel
 2 testified that Austria felt bad about the damaging testimony he offered in the guilt phase and wanted
 3 to help if he could. Counsel testified that he used Austria's testimony because he wanted to show
 4 that Austria had a "Svengali like" influence over petitioner - so as to diminish petitioner's culpability
 5 in the eyes of the jury. Exhibit 146, pp. 58, 60. No relief is warranted on this claim.

6 H. Trial counsel erred in failing to file a pretrial motion to preclude the requiring
 7 of Mr. Mercado to display his tattoos to the jury when Mr. Mercado did not
testify.

8 Petitioner contends that counsel should have prevented him from having to show his
 9 tattoos by filing a pre-trial motion.

10 The issue was presented at the very end of evidence and counsel objected to petitioner
 11 having to show his tattoos, but the court overruled the objection. The Nevada Supreme Court found
 12 that petitioner "failed to demonstrate that counsel knew before trial that the State would make such a
 13 request" and that he failed to show that the outcome of the trial would have been different if such a
 14 motion had been made. Respondents point out that petitioner suffered no prejudice as a result
 15 because he was never sentenced under the gang enhancement. The state supreme court's decision
 16 was not contrary to or an unreasonable application of clearly established federal law. Petitioner
 17 failed to show how he was prejudiced by this omission. No relief is warranted.

18 Grounds 19 (I) and (J) have been deleted by petitioner.

19 K. Counsel was ineffective by failing to move to dismiss before, during or after
 20 trial on appeal all counts of coercion.

21 Petitioner contends that trial counsel should have moved to dismiss the coercion
 22 charges because there was insufficient evidence to support the charge and had counsel moved to
 23 dismiss the charges, the outcome of the trial would have been different.

24 On appeal the Nevada Supreme Court found there had been sufficient evidence at trial
 25 to support the conviction. The United States Supreme Court formulates the sufficiency of the
 26 evidence questions as "whether, after viewing the evidence in the light most favorable to the

1 prosecution, any rational trier of fact could have found the essential elements of the crime beyond a
2 reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Under Nevada law, coercion
3 occurs when a reasonable victim would have believed that the defendant presented an immediate
4 threat of physical harm at the time the threat was made. *Santana v. State*, 112 Nev. 1458, 1461, 148
5 P.3d 741, 745 (2006).

6 Petitioner suggests that because some of the people in Renata’s at the time of the
7 robbery attempt did not see a gun when they were ordered to freeze or get down, or don’t move, and
8 because at least two of them fled from the bar into a nearby restroom, these individuals could not
9 have felt an immediate threat of physical harm. This argument is not persuasive. A reasonable
10 person, confronted by several men in masks, barking threatening orders in the course of an attempted
11 robbery, may, despite not seeing any actual weapons, feel a threat of harm. Moreover, even if they
12 feel a threat of immediate harm, some reasonable victims would risk that harm in order to escape to
13 safety.

14 The Nevada Supreme Court reviewed this claim and determined there was sufficient
15 evidence to support the charges and the conviction. The state high court’s decision was not
16 unreasonable. No relief is warranted on this claim under 28 U.S.C. §2254.

17 L. Trial counsel failed to file a pre-trial motion to dismiss or move for an
18 advisory verdict of acquittal as there was insufficient factual support for the
 gang sentencing enhancement on each of Mr. Mercado’s eighteen convictions.

19 In this claim, petitioner argues that there was insufficient evidence to support the gang
20 enhancement to the various crimes he was charged with committing and that counsel was ineffective
21 for failing to move to dismiss the enhancement or ask for a directed verdict. Nevada law requires
22 that a crime be committed “knowingly for the benefit of, at the direction of, or in affiliation with, a
23 criminal gang,” and “with the specific intent to promote, further or assist the activities of the criminal
24 gang....” NRS 193.168(1).

1 Because petitioner's sentence was not enhanced under this statute (exhibit 110), he
2 has failed to show how he was prejudiced by counsel's performance. No relief is warranted on this
3 claim.

4 M. Trial counsel failed to adequately prepare their expert witness used during the
5 penalty phase.

6 Petitioner complains that trial counsel did not prepare Dr. Roitman, the psychiatrist
7 engaged to testify on his behalf at the penalty phase and that counsel wrongly provided the doctor
8 with a copy of a report written by Dr. Mortillaro, even though that report contained language the
9 defense did not like, knowing that this disclosure would require they provide Mortillaro's report to
10 the prosecution. Petitioner's argument focuses on counsel' obligation to investigate the defendant's
11 background and family history. Petitioner contends counsel should have conducted this investigation
12 and then presented the information to Dr. Roitman.

13 In a capital case, it is necessary for counsel to investigate the defendant's social
14 history in order to present as strong a case in mitigation as possible. "In judging the defense's
15 investigation . . . , hindsight is discounted by pegging adequacy to 'counsel's perspective at the time'
16 investigative decisions are made, and by giving a 'heavy measure of deference to counsel's
17 judgments.' " *Rompilla v. Beard* 545 U.S. 374, 381 (2005) (quoting *Strickland v. Washington*, 466
18 U.S., at 689, 691). In this instance, counsel testified that Dr. Roitman was an excellent defense
19 witness who was able to help the jury understand the defendant as an individual entitled to
20 compassion in order to avoid the death penalty. Counsel testified that was the reason the doctor was
21 called and the death penalty was not imposed, making the witness effective in counsel's view.
22 Exhibit 146.

23 At the penalty hearing, Dr. Roitman testified that petitioner would function well in a
24 structured environment. Exhibit 93. He testified about petitioner's childhood and his family history,
25 noting he had been "raised by the street, not a family," that his father had died and petitioner had
26 been heavily influenced by his peers while his mother failed to take any control or offer any

1 guidance. The doctor was aware of and noted petitioner's drug use and his history of involvement in
2 illegal activities. Thus, it is clear that petitioner's family history and background had been
3 investigated and reviewed by the doctor. Dr. Roitman acknowledged he had reviewed an evaluation
4 conducted by another doctor, whom the state then called to testify that petitioner suffered from a
5 schizoid antisocial borderline personality.

6 The jury took the testimony and decided that petitioner should not be sentenced to
7 death. Thus, counsel's tactic to use the witness to prevent a death sentence was not unreasonable.
8 Furthermore, petitioner does not provide any information that counsel should have discovered if he
9 had done further investigation. He suffered no actual prejudice from this aspect of counsel's
10 performance and no relief is warranted.

11 N. Trial counsel failed to move to limit the improper victim impact statements
12 during the penalty hearing.

13 Here petitioner claims that counsel should have moved to preclude the
14 "extensive, emotional, and unrestrained testimony from multiple members of the victim's family."
15 This testimony, according to petitioner, rendered the penalty phase of the trial fundamentally unfair.

16 As discussed previously, victim impact testimony is properly admitted in the penalty
17 phase of the trial under federal and Nevada law. *See, Payne v. Tennessee*, 501 U.S. 808(1991) and
18 *Kelly v. California*, 129 S.Ct. 564 (2008) (Stevens, J., advisory opinion); *see also Homick v. State*,
19 108 Nev. 127, 136, 825 P.2d 600, 606 (1992) . Counsel for the defense offered strong, but
20 unsuccessful argument to the court to limit the amount and type of victim impact evidence at the start
21 of the penalty hearing. He also objected to the testimony of the fourth Serna family member, and
22 that witness was not called to testify.

23 The Nevada Supreme Court found that petitioner could not prevail on this claim
24 because petitioner had not shown that the evidence presented was excessive. This court agrees with
25 the state court's determination and petitioner has not met his burden under 28 U.S.C. § 2254 to
26 obtain relief.

1 O. Mr. Mercado's trial counsel failed to object to pervasive prosecutorial
2 misconduct that occurred during Mr. Mercado's penalty hearing closing
3 arguments.

4 Petitioner contends the prosecutor continually violated his due process rights during
5 the penalty arguments and counsel's failure to object violated his right to effective assistance of
6 counsel. Petitioner acknowledges that counsel did object in some instances, but contends that the
7 prosecutors arguments were egregious and inflammatory and blatant attempts to demonize the
8 petitioner. Petitioner notes the prosecutor improperly argued that petitioner was a direct and
9 personal threat to the jurors themselves; he compared the constitutional rights afforded petitioner by
10 the court to those denied the victim by the petitioner; and he misstated petitioner's mental state or
11 condition without objection from counsel.

12 The United States Supreme Court set forth the standard for deciding claims of
13 prosecutorial misconduct in the case of *Darden v. Wainwright* 477 U.S. 168 (1986). There the
14 Court determined that it "is not enough that the prosecutors' remarks were undesirable or even
15 universally condemned. The relevant question is whether the prosecutors' comments "so infected the
16 trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 181. In this
17 case the remarks did not violate petitioner's due process rights.

18 A review of the argument transcript reveals that counsel objected numerous times, but
19 that his objections were continually overruled by the court. Counsel can make a tactical decision to
20 limit objections when it might appear that it is merely an attempt to throw the opponent off the track
21 or to undermine the opponents arguments unfairly. Because his objections were having no impact on
22 the direction of the argument, it is feasible to conclude that counsel made a conscious decision to
23 limit his objections. The Nevada Supreme Court decision on this claim is valid. In addition,
24 petitioner has not demonstrated that he was prejudiced by the arguments for a death sentence, since
25 he was not sentenced to death.

26 Petitioner has failed to demonstrate that he received ineffective assistance of counsel
at trial or during the penalty phase of the proceedings. Ground Nineteen shall be denied.

1 Ground Twenty

2 Appellate counsel failed to raise a number of issues including errors
 3 during jury selection, concerns over a biased paid informant, concerns
 4 regarding the testimony of a co-defendant who received favorable
 5 treatment in return for his testimony, and erroneous jury instructions.
 6 Because of these failures, Mr. Mercado was denied the effective assistance
 7 of appellate counsel in violation of his sixth and fourteenth amendment
 8 rights under the United States Constitution.

9 Petitioner raises several subparts to this claim as follows:

- 10 (A) Appellate counsel failed to raise the issue that a juror who indicated that she
 11 believed that Mr. Mercado was probably guilty because the prosecution had
 12 gone to the trouble of bringing a case and that he should have to prove his
 13 innocence was not excused.
- 14 (B) Appellate counsel failed to raise the issue that a Filipino juror was excused by
 15 the prosecution and the prosecution failed to present a valid, race-neutral
 16 reason for exercising a peremptory challenge against her.
- 17 (C) Appellate counsel failed to raise the issue of the trial court limiting testimony
 18 regarding Carl Flores's role as an FBI informant.
- 19 (D) Appellate counsel failed to raise the issue that the State engaged in
 20 prosecutorial misconduct by improperly bolstering Felix Austria's credibility
 21 during Mr. Mercado's trial.
- 22 (E) Appellate counsel erred in failing to raise the issue of Mr. Mercado's Fifth
 23 Amendment rights when the court required Mr. Mercado to display his tattoos
 24 to the jury even though Mr. Mercado did not testify.
- 25 (F) Appellate counsel failed to raise the issue of improper jury instructions
 26 regarding reasonable doubt.
- (G) Appellate counsel failed to raise the issue of the improper jury instruction
 regarding premeditation and deliberation.
- (H) Appellate counsel failed to raise the issue of improper jury instruction
 regarding malice.

 (I) and (J) are claims that appellate counsel did not appeal the sufficiency of the
 evidence to support attempted robbery convictions and kidnapping with the use of a deadly weapon
 convictions have been abandoned, as the state dismissed these convictions in post-conviction
 proceedings.

- (K) Appellate counsel was ineffective for failing to challenge all counts of
 coercion on appeal.

- 1 (L) Appellate counsel failed to raise the issue that there was insufficient factual
2 support for the gang sentencing enhancement on each of Mr. Mercado's
3 eighteen convictions.
- 4 (M) Appellate counsel failed to challenge the prosecution's failure to present
5 sufficient evidence to convict Mr. Mercado.
- 6 (N) Appellate counsel failed to rise the issue of improper victim impact statements
7 during the penalty hearing.
- 8 (O) Appellate counsel failed to object to the pervasive prosecutorial misconduct
9 that occurred during Mr. Mercado's penalty hearing closing arguments.

10 The Due Process Clause guarantees a criminal defendant effective assistance of
11 counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 391-405, 105 S.Ct. 830, 833-40,
12 83 L.Ed.2d 821 (1985). Thus, petitioner in this instance must demonstrate that his appellate
13 counsel's performance undermined the appeal process and prejudiced his appeal. *See Miller v.*
14 *Keeney*, 882 F.2d 1428, 1433-1434 (9th Cir. 1989). In his attempts to meet this burden, petitioner
15 points to numerous claims he believes appellate counsel should have brought to the Nevada Supreme
16 Court on direct appeal.

17 As to those claims which underpin parts of Ground Eighteen: subparts (A), (C), (K),
18 (L), (N), and (O), petitioner cannot demonstrate the requisite prejudice because he had no likelihood
19 of success on the merits of the claims as discussed supra. As a result, it cannot be said that appellate
20 counsel was ineffective for failing to bring the claims on appeal. Petitioner is not entitled to relief on
21 these sub-claims.

22 As part (B) of this claim, petitioner contends that appellate counsel failed to raise the
23 issue that a Filipino juror was excused by the prosecution and the prosecution failed to present a
24 valid, race-neutral reason for exercising a peremptory challenge against her.

25 A criminal defendant is entitled to be tried before an impartial jury. U.S. Const.,
26 amend. VI. The composition of that jury may not be determined based on racial or other prohibited
discrimination. *Sims v. Georgia*, 389 U.S. 404, 407 (1967); *Norris v. Alabama*, 294 U.S. 587, 589
(1935). The jury selection process must be free from improper discrimination and "the Equal
Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race.

1 . . .” *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

2 In this instance, trial counsel raised a *Batson* objection to the state’s excusing a young
3 Filipino woman from the jury panel. Exhibit 77, pp. 100-107. The prosecutor offered his reasons for
4 excusing the woman, noting her young age, her responses to questions on the jury questionnaire
5 which indicated a bias against police officers, particularly traffic officers, and his and his co-
6 counsel’s poor evaluation of the potential juror made prior to jury selection based solely upon the
7 questionnaires. *Id.* The court accepted this reasoning, noting that both parties had agreed to excuse
8 another young woman of Korean descent because of family obligations the young woman had with
9 an new baby. *Id.*, p. 107. The court denied the challenge, finding the state had a permissible
10 racially neutral criteria for the dismissal of the potential juror. *Id.*

11 Petitioner’s reliance on *Eagle v. Linahan*, 279 P.3d 926 (11th Cir. 2001) is misplaced.
12 In *Eagle*, the *Batson* violation was clear in that the trial court did not focus its analysis on the
13 reasoning offered by the prosecution for its peremptory challenge decisions. Rather, the court merely
14 noted that both sides were “doing what they could to get the different races off” *Id.*, p. 941. Thus,
15 the error was obvious in that the challenge and the court’s decision was not made or decided under
16 the proper legal standards. Here, the petitioner merely challenged the dismissal of a single venire
17 person noting that person was the sole Filipino on the panel. Here also, the court heard the state’s
18 reasoning for its challenge to that juror and found those reasons to be racially neutral. The court’s
19 handling of the *Batson* challenge was correct. Counsel raised five significant errors on appeal. This
20 claim had no real chance of success, considering the record, and appellate counsel was not
21 ineffective in determining not to include it on appeal. As the Nevada Supreme Court said,

22
23 “[T]he issue comes down to whether the trial court finds the prosecutor’s
24 race-neutral explanations to be credible.” [fn 28. *Miller-El v. Cockrell*, 537 U.S.
25 322, 339 (2003).] A trial court’s credibility finding may be influenced by factors
26 including “the prosecutor’s demeanor; by how reasonable, or how improbably, the
explanations are; and by whether the proffered rationale has some basis in
accepted trial strategy.” [fn 29. *Id.*] Because the trial court’s finding on the issue
of discriminatory intent largely turn on evaluations of credibility, they are entitled
to great deference [fn 30. *See Thomas v. State*, 114 Nev. 1127, 1137, 967 P.2d
1111, 1118 (1998)] and will not be overturned unless clearly erroneous. [fn 31.

1 *Libby v. State*, 115 Nev. 45, 55, 975 P.2d 833, 839 (1999) (quoting *Hernandes v.*
2 *New York*, 500 U.S. 352, 369 (1991)).] We conclude the district court's findings
3 are not clearly erroneous and Mercado failed to demonstrate this issue had any
 likelihood of success on direct appeal. Accordingly, we conclude the district
 court did not err in denying this claim.

4 Exhibit 155, pp. 15-16. This determination is neither an unreasonable or a contrary application of
5 clearly established federal law. No relief is available under 28 U.S.C. § 2254.

6 In part (D) petitioner argues appellate counsel failed to raise the issue that the State
7 engaged in prosecutorial misconduct by improperly bolstering Felix Austria's credibility during Mr.
8 Mercado's trial. He notes the prosecution bolstered Austria's testimony on redirect by asking
9 whether Austria was telling the truth. The prosecutor elicited from Austria that his testimony at trial
10 was more detailed than that given to the police because police didn't question him to the same extent
11 as the prosecution did at trial. Petitioner notes that the state further asked Austria to confirm that his
12 plea agreement required him to testify truthfully or the benefits of the agreement would have been
13 withdrawn.

14 "Vouching [for the truthfulness of a State witness] is especially problematic in cases
15 where the credibility of the witnesses is crucial, and in several cases applying the more lenient
16 harmless error standard of review, [courts] have held that such prosecutorial vouching requires
17 reversal." *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991). A criminal conviction will
18 not be overturned on the basis of a prosecutor's comments standing alone, unless the comments,
19 viewed in context, affected the fairness of the trial. *U.S. v. Young*, 470 U.S. 1, 11 (1985). Vouching
20 by the prosecutor, must be examined with consideration of several factors. *U.S. v. Necochea*, 986
21 F.2d 1273 (9th Cir. 1992). Those factors include, "the form of vouching; how much the vouching
22 implies that the prosecutor has extra-record knowledge of or the capacity to monitor the witness's
23 truthfulness; any inference that the court is monitoring the witness's veracity; the degree of personal
24 opinion asserted; the timing of the vouching; the extent to which the witness's credibility was
25 attacked; the specificity and timing of a curative instruction; the importance of the witness's
26 testimony and the vouching to the case overall." *Id.*, at 1278.

1 In this instance, Austria's testimony was crucial to the prosecution, as he was a
2 member of the group of robbers, he identified petitioner as participating in the robbery and as the
3 person who shot and killed Mr. Serna. Exhibits 86, p. 105 through Exhibit 87, p. 76. On cross
4 examination, petitioner's counsel attempted to attack Austria's credibility by bringing out that he had
5 entered into a plea agreement and had received consideration for his testimony - showing bias. In
6 response to this questioning, on redirect, the prosecutor asked the witness whether his testimony
7 regarding what happened at the Renata Bar was true or whether, as the defense had suggested, he
8 merely told the police what they wanted to hear. Defense counsel objected to the question on the
9 basis of vouching, but the objection was overruled.

10 In *Necochea*, above, the prosecutor's actions in referencing the plea agreement, which
11 were similar to those here, were found not to constitute vouching. The court found that a
12 prosecutor's reference to the plea agreement and the promise of testimony was not a guarantee that
13 the testimony was truthful and was not vouching. *Id.* In this case, the Nevada Supreme Court was
14 correct in its determination of this claim.

15 In subpart (E) petitioner argues counsel should have claimed that the trial court
16 improperly required petitioner to display his tattoos in violation of his Fifth Amendment right against
17 self incrimination. As the Ninth Circuit and the Nevada Supreme Court have both said, a
18 defendant's rights against self-incrimination are not undermined by a requirement that he display
19 physical characteristics. *United States v. Bay*, 762 F.2d 1314, 1315-16 (th Cir. 1984); *Jacobs v.*
20 *State*, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). This conclusion is founded in *United States v.*
21 *Dionisio*, 410 U.S. 1, 5-6 (1973)("It has long been held that the compelled display of identifiable
22 physical characteristics infringes no interest protected by the privilege against compulsory
23 self-incrimination.") Tattoos are a physical attribute which is not protected as testimonial. Thus, the
24 Nevada Supreme Court decision cannot be said to be contrary to or an unreasonable application of
25 clearly established federal law allowing this court to afford relief under 28 U.S.C. § 2254.
26

1 Subpart (F) claims appellate counsel failed to raise the issue of an improper
2 reasonable doubt jury instruction. The Ninth Circuit Court of Appeals has expressly approved the
3 reasonable doubt instruction given during petitioner's trial. *Ramirez v. Hatcher*, 136 F.3d 1209,
4 1214 (9th Cir. 1998). Moreover, as petitioner notes, that court has "foreclose[d]" such claims as
5 petitioner raises here. *Nevius v. McDaniel*, 218 F.3d 940-944-945 (9th Cir. 2000). No relief is
6 warranted from this court on this claim.

7 Subpart (G) claims counsel improperly failed to raise the claim that the jury
8 instruction on premeditation and deliberation were in error.

9 The Nevada Supreme Court denied relief on this claim stating:

10 We conclude that appellant failed to demonstrate that appellate counsel's
11 performance was deficient or that this issue had a reasonable probability of
12 success on appeal. The jury was properly instructed pursuant to the controlling
13 statutes and caselaw in effect at the time of his crime and trial. [fn 33. NRS
14 175.211 (setting forth definition of reasonable doubt); NRS 200.010 (defining
15 murder); NRS 200.020 (defining malice); NRS 200.030 (setting forth the degrees
16 of murder); *Kazalyn v. State*, 108 Nev. 67, 75-76, 825 P.2d 578, 583-84 (1992)
17 (holding nearly identical instructions of premeditation and malice aforethought
18 adequately instructed the jury); *Lord v. State*, 107 Nev. 28, 40, 806 P.2d 548, 555-
19 56 (1991) (holding that the definition of reasonable doubt set forth in NRS
20 175.211 satisfies due process); *see also Leonard v. States*, 117 Nev. —, 17 P.3d
21 397, 411 (2001) (holding no error in providing *Kazalyn* jury instruction); *but see*
22 *Byford v. State*, 116 Nev. 215, 233-37, 994 P.2d 700, 712-13 (2000)
23 (reconsidering the *Kazalyn* instruction and determining that further instruction
24 explaining deliberation would be preferable.)] Therefore appellant is not entitled
25 to relief.

19 Exhibit 135, p. 22.

20 As the court noted, in 2000, the Nevada Supreme Court determined that the jury
21 instruction at issue here – the *Kazalyn* instruction – "blurs the distinction between first and second
22 degree murder," and crafted a new more comprehensive instruction. *See Byford v. State*, 116 Nev.
23 215, 233-237, 994 P.2d 700, 712-713 (2000). However, the court also held that the change in the
24 law was not one of constitutional dimensions warranting retroactive application to convictions that
25 became final prior to the *Byford* decision. *Id.*

1 Later, in *Polk v. Sandoval*, 503 F.3d 903,909 (9th Cir. 2007) and *Chambers v.*
2 *McDaniel*, 549 F.3d 1191, 1199 (9th Cir. 2008), the circuit court found the Kazalyn instruction
3 violated due process because it relieved the state of its burden to prove every element of the crime of
4 first degree murder. *Polk*, 503 F.3d at 909. Because the court determined the state court's decision
5 on the *Kazalyn* instruction was contrary to clearly established federal law, it reviewed the claim *de*
6 *novo*.⁴ The court applied a harmless error analysis wherein relief is warranted only if "the error had a
7 substantial and injurious effect or influence in determining the jury's verdict." *Id.*, at 911, citing
8 *Brecht v. Abrahamson*, 507 U.S. 610, 637 (1993).

9 The same analysis must be applied to this case as well. Here the strongest evidence of
10 petitioner's involvement was the testimony of co-defendant Felix Austria and paid FBI, Carlos
11 Flores. Austria's testimony arose as the result of a plea negotiation. He testified that petitioner and
12 two others participated with him in the robbery attempt, that he, petitioner, and J. George Chuatoco
13 entered the bar, told the patrons and employees to get down and not move, that he was covering the
14 bar area when the bartender moved toward what Austria suspected was an alarm, whereupon, Austria
15 fired his weapon, striking the bartender and wounding him. Austria further testified that between the
16 two shots he fired he heard another series of two gun shots, but was unsure from where the shots
17 originated. He stated he immediately called for everyone to "get out" and he and Chuatoco ran for
18 an exit. Petitioner did not exit the bar and Otto Kaufman drove the group away from the scene.
19 According to the testimony, petitioner told Austria that he had run out of the bar after shooting Serna
20 and had hidden in the area for several hours.

21 Carlos Flores also testified that petitioner had told him about the plan to rob Renata's
22 and had asked him to participate. He testified that after the robbery, petitioner admitted to him that
23 he had shot Mr. Serna as he tried to run away. Various patrons and employees of Renata's also

24
25 ⁴ The court found the Nevada Supreme Court's decision was contrary to *In re Winship*, 397 U.S.
26 358, 364 (1970) which holds that "the Due Process Clause protects the accused against conviction
except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which
he is charged.").

1 testified. Patrick Pino was in the kitchen and testified he saw a short man with black hair chase Mr.
 2 Serna into the kitchen and shoot him. At least three other witnesses confirmed the man who shot
 3 Serna was short with black hair, dark skin and a Filipino accent. Petitioner fits that description.

4 Based on the evidence presented at trial, the jury properly concluded that the killer –
 5 acted deliberately and intentionally to kill Serna and that he did so after having thought about doing
 6 it, as evidenced by the fact that he chased the victim and then shot and killed him. Thus, while the
 7 instruction given was flawed, as later acknowledged by the Nevada Supreme Court, all the essential
 8 elements of first degree killing were present and proved beyond a reasonable doubt to the jury. In
 9 this case, the Kazalyn instruction could not have had a substantial and injurious effect or influence in
 10 determining the jury's verdict.

11 Part (H) claims appellate counsel failed to raise the issue of an improper jury
 12 instruction regarding malice. Petitioner argues the instruction given created a presumption of malice
 13 in violation of NRS 47.230 and that the Nevada Supreme Court's decision on this claim was an
 14 unreasonable application of clearly established federal law.

15 NRS 47.230 provides:

- 16 1. In criminal actions, presumptions against an accused recognized at common
 17 law or created by statute, including statutory provisions that certain facts are
 prima facie evidence of other facts or of guilt, are governed by this section.
- 18 2. The judge shall not direct the jury to find a presumed fact against the
 19 accused. When the presumed fact establishes guilt or is an element of the
 20 offense or negatives a defense, the judge may submit the question of guilt or
 21 of the existence of the presumed fact to the jury, if, but only if, a reasonable
 22 juror on the evidence as a whole, including the evidence of the basic facts,
 could find guilt or the presumed fact beyond a reasonable doubt. Under
 23 other presumptions, the existence of the presumed fact may be submitted to
 the jury if the basic facts are supported by substantial evidence, or are
 24 otherwise established, unless the evidence as a whole negatives the existence
 25 of the presumed fact.
- 26 3. Whenever the existence of a presumed fact against the accused is submitted
 to the jury, the judge shall give an instruction that the law declares that the
 jury may regard the basic facts as sufficient evidence of the presumed fact
 but does not require it to do so. In addition, if the presumed fact establishes
 guilt or is an element of the offense or negatives a defense, the judge shall
 instruct the jury that its existence must, on all the evidence, be proved
 beyond a reasonable doubt.

1 The jury instruction offered to petitioner's jury regarding express or implied malice
2 read

- 3 1. Express malice is that deliberate intention unlawfully to take away the life of a fellow
4 creature, which is manifested by external circumstances capable of proof.
- 5 2. Malice *may* be implied when no considerable provocation appears, or when all the
6 circumstances of the killing show an abandoned and malignant heart.

7 Exhibit 88, Instruction No. 7 (emphasis added).

8 The instruction given to the jury in petitioner's trial clearly gives a permissive, not
9 mandatory, directive despite the exact wording of the Nevada statute defining malice. *See* NRS
10 200.020. The word "may," as defined by Merriam-Webster's Collegiate Dictionary, is one used to
11 indicate the possibility or probability of a thing happening, indicating permission to do some thing.
12 *Id.*, 10th Ed., p. 717. Thus, its use cannot and does not create a mandatory presumption in this jury
13 instruction. Moreover, the use of the word "may" is preferred and has been approved by the Nevada
14 Supreme Court as proper to avoid any unconstitutional lessening of the burden of proof borne by the
15 State. *See Leonard v. State*, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001); *Cordova v. State*, 116
16 Nev. 664, 6 P.3d 481, 482-83 (2000) (use of word "may" eliminates the issue of a mandatory
17 presumption). In light of this, petitioner's contention that this claim would have been successful if it
18 had been brought to the Nevada Supreme Court on appeal fails. This claim does not warrant relief,
19 as the instruction does not violate his constitutional due process rights.

20 Subpart (I) and (J) were excluded because the related convictions were dismissed on
21 post conviction. Subparts (K) and (L) were discussed and denied *supra*.

22 Subpart (M) is a claim that appellate counsel was ineffective in failing to challenge on
23 appeal the sufficiency of the evidence to convict petitioner. He argues he suffered denial of his
24 constitutional rights to due process because he was convicted without sufficient evidence. In fact,
25 petitioner argues the evidence "failed to show that Mr. Mercado was at all involved in the incident at
26 Renata's" and counsel should have argue such on appeal. This claim is without merit.

1 A question of sufficiency of the evidence to convict requires the court to view the
2 evidence in a light most favorable to the prosecution, and then determine if, in that light, an rational
3 trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4 *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Petitioner's present attempts to impeach the
5 credibility of various witnesses are misplaced, because the trier of fact is charged with determining
6 the credibility of the witnesses, and a reviewing court must give those determinations deference.
7 *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004).

8 The evidence presented at trial included the testimony of Austria and of Flores as
9 discussed above, the testimony of various patrons and employees of Renata's that witnessed the
10 robbery and/or shooting and described the perpetrator in terms that matched petitioner's physical
11 attributes as well as other circumstantial evidence tending to show petitioner's involvement in the
12 robbery and shooting. This evidence, viewed in favor of the prosecution, was sufficient, as the
13 Nevada Supreme Court found. Exhibit 135, p. 9.

14 Subparts (N) and (O) were previously discussed and denied.

15 **III. Certificate of Appealability**

16 In order to proceed with an appeal of this decision, petitioner must receive a
17 certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*
18 *Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550,
19 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of the denial of a
20 constitutional right" to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v.*
21 *McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that reasonable jurists
22 would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*
23 (*quoting Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the
24 burden of demonstrating that the issues are debatable among jurists of reason; that a court could
25 resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed
26 further. *Id.*

1 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing
2 Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in
3 the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
4 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has
5 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
6 issuance of a certificate of appealability, and determines that none meet that standard. The Court
7 will therefore deny petitioner a certificate of appealability.

8 **IV. Conclusion**

9 Petitioner has not met his burden to show that the Nevada Supreme Court's decisions
10 on his various claims were contrary to or involved an unreasonable application of clearly established
11 federal law or that its factual findings were unreasonable in light of the evidence it was presented.
12 Petitioner is not entitled to relief on any of his claims from this court and the petition shall be denied.

13 **IT IS THEREFORE ORDERED** that the Second Amended Petition for Writ of
14 Habeas Corpus (docket #37) is **DENIED**. The Clerk shall enter judgment accordingly.

15 **IT IS FURTHER ORDERED** that a Certificate of Appealability is **DENIED**.

16 DATED this 23rd day of April, 2010.

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18 UNITED STATES DISTRICT JUDGE
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